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IN THE

Supreme Court of the United States

NO. 498 OCTOBER TERM, 1949.

CENTRAL TRUST COMPANY OF NEW YORK, Plaintiff,

v.

THE PITTSBURG, SHAWMUT AND NORTHERN RAILROAD COMPANY, SHAWMUT MINING COMPANY, THE KERSEY MINING COMPANY and HAMILTON TRUST COMPANY, Defendants.

ROBERT WOMSLEY, CHARLES A. WOODS, JR., and KENNETH BALLENTYNE, Constituting a Committee for the Protection of Holders of Certificates of Indebtedness of the Receiver of The Pittsburg, Shawmut and Northern Railroad Company and the Mortgaged Properties of the Shawmut Mining Company and The Kersey Mining Company; HUGO E. SELLGER; EDWARD L. BLACKMAN and PFLUGFELDER, BAMPTON & RUST, a Partnership, Individual Holders of Some of Such Certificates, Petitioners.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

STATEMENT OF THE CASE.

Petitioners' statement of the case is incomplete, particularly in that they do not mention the fact that the receivership, which began on August 1, 1905, pertained not only to the debtor railroad but also to the mortgaged properties of two affiliated mining companies, Shawmut Mining Company and The Kersey Mining Company, and the fact that the order authorizing the receiver to pay the necessary current expenses of operating the mortgaged properties and premises out of the funds from time to time coming into the receiver's hands from the operation of the debtor railroad (petitioners' brief, p. 5)

was made on August 1, 1905, at the time of the appointment of the receiver. The order authorizing payment of the necessary current expenses was made before any certificates of indebtedness of the receiver had been authorized, issued or sold.

The series of orders made between August 25, 1905, and June 29, 1910, authorizing the receiver to issue certificates in the aggregate amount of $3,100,000 did not provide that such certificates were to be issued in order "to raise funds necessary to keep the railroad in operation" (petitioners' brief, p. 3) but, on the contrary, the orders provided that the certificates were to be issued and sold and the proceeds thereof were to be used for various capital expenditures and improvements to the railroad and the mining properties (10a, 13a, 14a, 16a, 17a). The court orders authorizing the issuance of the certificates only granted to the certificates a lien upon the receivership properties and "the net income, receipts and profits thereof, prior to the lien of the said mortgages or deeds of trust, or any of them," theretofore created upon the receivership properties, and in case of any judicial sale of the properties the "certificates, principal and interest, and each of them", were to be paid "from moneys arising from such sale prior to any payment on account of said mortgages or deeds of trust, or any of them".

The receiver, beginning sometime shortly after August 25, 1905, and ending sometime prior to July 3, 1917, expended the $3,000,000 realized from the sale of the certificates, together with an additional sum of about $1,000,000 taken from the net earnings of the mortgaged properties, for additions and betterments to the mortgaged railroad and mining properties (6b).

After June 29, 1910, the court did not authorize the issuance of any new certificates except for the purpose of taking up those outstanding as they fell due. The subsequent orders authorizing the refunding certificates did not alter the lien provision of the prior orders (35a). The reduction of the aggregate amount of outstanding certificates from $3,100,000 to $2,044,350 was the result of the court orders of February 29, 1924, and June 16, 1927, which respectively authorized the retirement of 30% and 5% of the outstanding certificates by means of a pro rata payment thereon from accumulated funds of the receivership properties and the exchange of new certificates for the unpaid residue of the old certificates (46a, 48a, 65a; petitioners' brief, p. 4).

The original receiver, Frank Sullivan Smith, and his successor receivers, Henry S. Hastings, John D. Dickson, and Thomas C. Buchanan and Robert C. Sproul, Jr., operated the railroad and the mortgaged properties of the two affiliated mining companies from August 1, 1905, to the date of the judicial sale of the receivership property in the spring of 1947. At the time of the hearing on August 28, 1947, before the district judge, all operating expenses had been paid from 1905 to 1942; most of the operating expenses had been paid from 1942 to December 1, 1945; and all operating expenses had been paid from December 1, 1945, to the date of the cessation of the operation of the railroad in the spring of 1947. From August 25, 1905, to the time of the hearing on August 28, 1947, no holder of certificates, including the petitioners, had ever objected to the payment of the operating expenses. At the hearing on August 28, 1947, petitioners, though they had not theretofore objected to any payment of operating expenses of the receiver, immediately ob-

jected to the receivers' proposal for payment in full of the unpaid operating expenses which had accrued from 1942 to December 1, 1945. Petitioners frankly admitted, by their counsel, while asserting the objection to the payment of the unpaid operating expenses, that there was no distinction between the unpaid operating expenses and expenses which had accrued before and after them and that they could give no valid reason for distinguishing the unpaid from the paid operating expenses except their arbitrary decision to object to the one but not to the other category of operating expenses. The following colloquy took place between the judge and petitioners' counsel at the hearing on August 28, 1947, (21b, 22b):

> "*The Court*: Let me ask you, is it true, as Mr. Goodman said, they are paid, but I was going to say what about the current obligations incurred by Mr. Sproul and Mr. Buchanan as against your group? Of course, there aren't any current obligations since they have been paid. Do you make any claim as to any irregularity on the part of the Trustees in paying current obligations?
>
> *Mr. Eckels*: No, your Honor, we do not. The position may be inconsistent, but we do not object to the payments that they have made to their own creditors.
>
> *The Court*: How do the current obligations that they incurred differ any from Mr. Dickson's?
>
> *Mr. Eckels*: Your Honor, there is no substantial difference, in my opinion, except we have not objected to them and we don't intend to object to them.

The Court: What is your position?

Mr. Eckels: Our position is only with respect to the claims of Mr. Dickson's creditors, that at the very worst, the Receivers' Certificates and the operating expenses of Mr. Dickson are on a parity.

The Court: How do Mr. Dickson's obligations differ from Mr. Sproul's and Mr. Buchanan's?

Mr. Eckels: Your Honor, I do not think they differ at all, but we are not objecting to the payment of them."

Certain of the operating expense creditors of the debtor railroad have joined in filing this brief. The Baltimore and Ohio Railroad Company filed a claim which has been allowed in the amount of $29,353.84 for operating expenses of the receiver of the railroad from July, 1945, until December 1, 1945, and $25,148.65 of this amount arose from interline freight balances. The Erie Railroad Company filed a claim which has been allowed in the amount of $25,207.02 for operating expenses incurred between August 1, 1945, and December 1, 1945, and $22,943.09 of this amount represents freight interchange collected by the receiver and not paid over to the Erie Railroad. The Pennsylvania Railroad Company filed a claim which was allowed in the amount of $109,375.72, incurred between May 1, 1945, and December 1, 1945, and $96,625.25 of this amount represents interline freight and interchange. The American National Red Cross filed a claim in the amount of $26,386.59, for amounts due under two leases of railroad right of way and adjoining property for the years 1942 through 1947. The claim of The American National Red Cross was reduced by agreement to $20,000.00 (18b) and $10,000.00 of the claim was allocated to the period of the receiver-

ship of Messrs. Buchanan and Sproul (20b). The remaining $10,000.00 of the Red Cross claim was allocated to the period of the receivership of Mr. Dickson (20b). The claim of the Red Cross for the period of Mr. Dickson's receivership which is now before this Court includes New York taxes in the amount of $6,582.57, the payment of which was essential if the receivers were to comply with the terms of the sale of the property (19b) whose proceeds are being distributed. As part of the agreement arrived at between The American National Red Cross and the receivers the Red Cross agreed to pay the New York taxes if its claim was allowed in the sum of $20,000.00. The receivers, following this agreement, paid to the Red Cross the sum of $10,000.00, representing the portion of the claim allocated to the period of the receivership of Messrs. Buchanan and Sproul (21b).

The Court will notice that although there are 96 holders of certificates who have filed claims with the receiver (75a-79a), and originally 37 of them excepted to the order of distribution (81a, 85a), the petitioners to this Court, objecting to the full payment of the operating expenses, are only three, holding 19.9 per cent of the total amount of outstanding certificates (75a, 76a). These petitioners upon their appeal from the order of the district court filed a bond on appeal in the sum of $250 (5a) and were not willing to file a bond in an amount sufficient to obtain an order of supersedeas.

SUMMARY OF ARGUMENT.

There is no conflict between the decision of the courts below and the decision of this Court in *Union Trust Co. v. Illinois Midland Ry. Co.*, 117 U. S. 434, or of the Court of Appeals for the Fifth Circuit in *First National Bank of Houston v. Ewing*, 103 Fed. 168, or of the Court of Appeals for the Eighth Circuit in *Reconstruction Finance Corp. v. Missouri-Kansas-Texas R.R. Co.*, 122 F. 2d 326.

There is no question of public importance or general interest involved in this case.

The courts below were correct in their decision on the merits of the controversy.

The claims of railroad operating expense creditors of the receiver are entitled to priority of payment over the receiver's certificates, since the certificates were issued for capital expenditures and improvements to the railroad and mining properties. It is manifest that the court, in the orders authorizing the issuance of the receiver's certificates, granted to those certificates a lien of priority only over the pre-existing mortgages or deeds of trust or any of them and did not grant such certificates any priority over railroad operating expense creditors. The court's order now appealed from, authorizing payment in full of the railroad operating expenses with priority over the certificates, principal and interest, far from being "grossly inequitable" and "a flat repudiation of the District Court's self-incurred debts, an exercise of judicial power 'not to be sanctioned under any conditions' " (petitioner's brief, p. 11), was a proper determination, in accordance with established princi-

ples, of the relative rights of the railroad operating expense creditors and the certificate holders.

The continued operation of the railroad depended upon the freedom of the receiver to incur and provide for the expenses of operation, and such continued operation was not only for the protection and benefit of the public but also for the protection and benefit of the interests of the certificate holders. Had the receiver been unable to operate the railroad at any time, a judicial sale would have been forced when the price realized for the receivership property might not have been available.

The courts below properly refused to come to the conclusion, since it was not compelled by the language of the orders authorizing the issuance of the certificates and the conditions under which they were made, that the receivership court from August 25, 1905, to June 29, 1910, intended to fetter and indeed to render wholly impossible the continued operation of the debtor railroad in the future by imposing upon themselves and the receiver an impotence to make acceptable provision for the necessary future expenses of operation.

Since the proceeds of the certificates in this case were expended wholly for capital improvements and betterments not only to the railroad but also to the two affiliated mining companies, the certificate holders are not entitled to stand on a parity with the railroad operating expense creditors.

Certiorari should therefore be denied.

ARGUMENT.

The priority of receiver's certificates is fixed by the terms of the court orders authorizing their issuance.

In *Reconstruction Finance Corporation v. Missouri-Kansas-Texas R.R. Co.*, 122 F. 2d 326 (C.C.A. 8, 1941), the court said (p. 330):

> "Any priority, however, which it was intended at the time that they [receiver's certificates of indebtedness] were to have over subsequent operating expenses should have been clearly indicated in the court orders which authorized their issuance."

The court orders authorizing the issuance of receiver's certificates in the instant case provided no priority over subsequent operating expenses. The certificates were "a debt by said Receiver * * * and * * * a lien upon said mortgaged property, railroads and franchises, coal lands, mining rights and mining plants, and the net income, receipts and profits thereof, prior to the lien of said mortgages or deeds of trust * * *" (7a).

The court, at the time when it made these orders, clearly contemplated, as is manifest from the portion of the order of August 1, 1905, authorizing the receiver to continue operation of the properties and to pay the necessary current expenses of operation thereof, that the operations of the railroad should be continued and paid for. The certificates are made a lien upon the *net* income, receipts and profits of the properties. There can be no *net* income until the expenses of operation are paid. The only priority granted the certificates by these orders is over the existing mortgages and deeds of trust.

In the *Missouri-Kansas-Texas* case, *supra*, the certificates were given a much broader priority. They were (p. 330)

> "* * * a direct lien upon all the property and franchises, wherever located, of the Fort Smith and Western Railway Company * * * and upon the net income thereof, prior and paramount to the * * * mortgages or deeds of trust, * * * *and prior and paramount to all other liabilities and obligations of every kind, character and nature of said Fort Smith and Western Railway Company.*" (Italics added.)

In spite of this all-inclusive priority provision, the Court of Appeals for the Eighth Circuit held that operating expenses and receiver's certificates whose proceeds had been used for operating expenses should be given priority over receiver's certificates whose proceeds had not been used for operating expenses. The court said (p. 331):

> "The receiver's operation of the railroad was not in the interest of creditors and stockholders alone, but equally for the purpose of attempting to preserve the service to the public, to which the railroad of necessity was dedicated. No one could say how long the effort to serve the public interest through receivership operation ought justifiably to be continued. In this situation, the conclusion ought not to be indulged, unless inexorably compelled by the language of the order and the conditions under which it was made, that the court was intending to fetter and perhaps render wholly impossible the continued operation of the railroad, by an impotence to make acceptable provision for nec-

essary future expenses. Certainly such a conclusion is not soundly required here. We think the trial court properly held that the orders authorizing the receiver's certificates were intended to create a priority only over existing liens and obligations of the railway company, and that the matter of the receiver's future operating expenses was left entirely open. Indeed, even if an attempt had been made to create an absolute and complete priority in the issuance of the receiver's certificates, this would not, generally speaking, have precluded the court from subsequently making an equitable readjustment, with respect to the necessary expenses of continuing the operation of the railroad in the public interest."

To the same effect is *Anderson v. Condict,* 93 Fed. 349 (C.C.A. 7, 1899), where the court said (p. 353):

"It is not presumable that the court would devest itself of the power to pay the expense of operation which it had assumed. That would be an act of felo de se. It granted to the certificates a lien paramount to that of the trust deed, subject, however, to the payment of operating expenses and costs of administration; and this, we think, comprehends all liability incurred in the operation of the railway."

Rental for the use of leased tracks and terminals, as in the case of the property of The American National Red Cross here involved, was allowed as an operating expense with the same priority as pertained to other operating expenses in *Union Trust Co. v. Illinois Midland Ry. Co.,* 117 U.S. 434. This Court said, by Mr. Justice Blatchford (p. 467):

"'And it seems to me that the rentals for the use of the leased lines were incurred as much for the common benefit as were the expenses for employes and supplies along the line. If the management of the road had been so profitable as to have left a net income to apply on the mortgage debt, the Paris and Decatur bondholders would have been entitled to their proportionate share of the income derived from the use of the leased lines; they could scarcely have expected that without contributing to the payment for the use of those lines.' These views apply equally to the terminal facilities furnished by the leasing roads."

See also *Mercantile Trust Co. v. Farmers' Loan & Trust Co.*, 81 Fed. 254, 258 (C.C.A. 8, 1897).

In the case at bar the proceeds of the receiver's certificates were not expended on operations but on capital improvements and betterments to the railroad and to the properties of the mining companies. To the extent that the certificates represent investments in the mining properties, they are obviously not of the same quality as the railroad operating expenses of the receiver and are not entitled to share in distribution on a parity with those railroad operating expenses. To the extent that they represent capital improvements to the railroad properties, they are also subordinate to the railroad operating expenses, as has been held in many instances.

In *Texas Co. v. International & G. N. Ry. Co.*, 237 Fed. 921 (C.C.A. 5, 1916), certiorari denied *sub nom. Central Trust Co. v. Texas Co.*, 243 U.S. 647, the court authorized receiver's certificates in the amount of $1,400,000 and gave them a prior lien upon the mort-

gaged property and all other property in the possession of the receivers and upon the net earnings and income resulting from operations. The proceeds of the certificates were used for the erection of shops, the acquisition of passenger equipment and the ballasting of the tracks. The court held (p. 937) that these expenditures were not expenses of operation, and that one who furnished labor and supplies to the receiver for the operation of the railroad was entitled to be paid ahead of the receiver's certificates.

A similar case is *First National Bank of Houston v. Ewing,* 103 Fed. 168 (C.C.A. 5, 1900), certiorari denied 179 U.S. 686, in which the receiver had been authorized to issue certificates of indebtedness and to expend the proceeds on capital improvements almost identical with those in this case. After the sale of the railroad by the receiver, there were not sufficient funds to pay the operating expenses and receiver's certificates in full. The court gave certain operating expenses priority over the holders of the receiver's certificates. The operating expenses thus given priority are of the same nature as those of the respondent railroads, namely, traffic balances owing to connecting railroads and right of way claims (103 Fed. 168, 173).

The decision in *Reconstruction Finance Corp. v. Missouri-Kansas-Texas R. R. Co.,* 122 F. 2d 326 (C.C.A. 8, 1941), emphasizes the fact that operating expenses are entitled to priority of payment over all other expenses of the receiver except costs of administration and taxes. There the court allowed receiver's certificates whose proceeds had been used for operating expenses to share pro rata with operating expense claims, but subordinated the receiver's certificates whose

proceeds had been used for other expenses. This is made particularly clear in the unreported opinion of the District Court for the Western District of Arkansas, copies of which were furnished by petitioners to the courts below. The opinion of the district court in that case supports the position of respondents and not that of petitioners. The court said (p. 15):

> "Aside from these two items, so far as the orders disclose, all of the money procured from the Reconstruction Finance Corporation (the holder of the receiver's certificates) went for operating expenses of the Receiver of the Fort Smith and Western Railway Company."

Accordingly, the court concluded (p. 17):

> "The Court is of the opinion that the amount of the claim of the Reconstruction Finance Corporation should be allowed *as an operating expense,* except the amount which the court has specifically held was incurred prior to the receivership on June 1, 1931." (Italics added.)

The *Missouri-Kansas-Texas* case holds that if the proceeds of the receiver's certificates are used for operating expenses, the certificates are entitled to prorate with operating expenses, but if the proceeds are used for other purposes, they may not prorate with operating expenses. As was said in *Fidelity Insurance & Safe Deposit Co. v. Shenandoah Iron Co.,* 42 Fed. 372, 377 (W.D. Va., 1889), receiver's certificates, being merely evidences of indebtedness, have no higher priority than the claims which they represent.

The decision of this Court in *Union Trust Co. v. Illinois Midland Ry. Co.,* 117 U.S. 434, is authority in

support of the decision of the courts below in the case at bar. The position of the petitioners in this case is analogous to the position of the bondholders in that case. There the bondholders were to receive in distribution the balance of the proceeds of judicial sale remaining after the payment of the preferred costs and expenses of the receivership, and in this case the certificate holders, under the order of the lower court, are to receive the balance of the proceeds of the judicial sale after payment of the operating expense claims. There the proceeds of the sale were not sufficient for the entire payment of the receivership costs and expenses and the claims of the bondholders, and here the proceeds are not sufficient for the entire payment of the operating expense claims and the certificate holders' claims. The equity of the bondholders of the Pittsburg, Shawmut and Northern Railroad was eliminated long ago and the only lienholders with any equity in this railroad are the certificate holders. The petitioners in this case, in the position of the bondholders in the *Illinois Midland* case, here assert the very same contentions which were there pressed by the bondholders. There the bondholders complained of a provision in the final decree which gave priority over their bonds to the following items: wages due employees of the receivers, indebtedness due from the receivership to railroad companies, general indebtedness of the receivership for supplies, damages and miscellaneous items and several other claims (p. 464). The operating expense claims granted priority in the case at bar are claims of employees of the receiver, indebtedness due from the receivership to railroad companies on account of freight interchange, car service and other railroad charges, general indebtedness of the receivership for supplies, rentals for leased trackage

and terminals, and like items (66a). This Court in the *Illinois Midland* case granted priority for exactly the same kinds of claims as those of the respondents here not only out of the income of the road but from the proceeds of the sale of the receivership property itself. The certificate holders here were in the same position as the bondholders in that case; that is, they had furnished funds for capital expenditures and improvements to the receivership properties. After the issuance of the receiver's certificates and the creation of their lien, the respondents here extended credit to the receivers by letting the receivers use their property, their credit for the payment of taxes and their services as connecting carriers, just as the receiver's certificate holders in the *Illinois Midland* case allowed the receiver there to use their services and their credit in exchange for receiver's certificates. In each case it is the *nature* of the claim of the operating expense creditors rather than its form which requires the grant of priority to such creditors.

This Court in the *Illinois Midland* case, recognized that where current income is diverted to the improvement of the receivership property and debts for operating expenses are not paid, provision should be made to pay such operating expense debts out of the proceeds of the sale of the property. The Court said, by Mr. Justice Blatchford (pp. 462-463):

> "The commissioner and the Circuit Court rested the allowance of these certificates on what was said by this court in the case of *Fosdick v. Schall,* 99 U.S. 235, 253, 254, which views were applied in *Burnham v. Bowen,* 111 U.S. 776, to the effect that, when the current income of a railroad in the hands of a receiver is diverted to the improvement of the prop-

erty by the receiver, and debts for operating expenses are not paid, provision should be made, in foreclosing a mortgage on the road, to pay such debts out of the proceeds of the sale of the property. See, also, *Union Trust Co. v. Souther,* 107 U.S. 591."

It was also contended in the *Illinois Midland* case by the bondholders, as it is contended in the case at bar by the certificate holders, that though certain debts had been admittedly incurred by the receiver in the regular operation of the railroad, such claims were entitled to priority only out of the income of the railroad and not out of the proceeds of the property. This Court, in rejecting the contention and holding that such claims were entitled to priority out of the proceeds of the property as well as the income therefrom, said (pp. 464-465):

"As to items (1) (2) (3) (4) and (5), while it is admitted that these debts were incurred for the ordinary expenses of the receivers in operating the road, it is contended that they are entitled to priority only out of the income of the road, and not out of the proceeds of the property itself. Of course, such items are payable out of income, if any, before the *corpus* is resorted to, but that may be resorted to when the items are proper ones to be allowed for operating expenses, after scrutiny and opportunity for those opposing to be heard. This view is in accordance with the principles above laid down and the authorities above cited.

"It is contended, however, that, in the order of September 11, 1875, appointing Dole receiver, while authority was given to him to carry on the business of the road, and to make repairs and additions essential to its interests and safety, it was provided,

that, out of the moneys he should receive from its operation, he should pay for the expenses of operation; that he was not authorized by that order to contract any debt which the receipts of the road would not pay; that the terms of the order were such as to exclude the payment of any of the expenses embraced in the six items above named out of any fund other than the receipts from the operation of the road; and that the orders appointing Rees and Genis were equally limited. But we think this view is not correct. The terms of these orders do not impair or exclude the ample authority which the court would otherwise have, and otherwise has, to order the claims in question to be paid out of the property itself, with priority."

There is, as is indicated in the *Illinois Midland* case, another compelling reason why the operating expenses should be preferred over the receiver's certificates. This Court and other federal courts have held, in railroad receiverships, that where there is a diversion of the income derived from the receiver's operation to the payment of capital expenditures, persons having claims for operating expenses are entitled to priority of payment out of the corpus of the receivership estate to the extent of the diversion. This is on the theory that the income produced by operations must first be applied to the payment of the expenses of the operations. *Fosdick v. Schall*, 99 U.S. 235, 253-254; *Texas Co. v. International & G. N. Ry. Co., supra.*

Thus in *Clark v. Central R.R. & Banking Co.*, 66 Fed. 803 (C.C.A. 5, 1895), affirmed 170 U.S. 355, it was held that one who furnished coal to the railroad for its op-

eration both shortly before and during receivership was entitled to priority of payment out of the corpus of the estate over claims for expenditures for permanent improvements to the railroad where the receiver's income had been diverted to pay the expenditures for the improvements. See also *Gregg v. Mercantile Trust Co.*, 109 Fed. 220 (C.C.A. 6, 1901), affirmed 197 U.S. 183.

In the case at bar the receiver expended some $4,000,000 for additions and betterments to the railroad and mining properties, of which about $3,000,000 was derived from the receiver's certificates, and about $1,000,000 was taken from the net earnings of the properties (6b). In addition to this diversion of $1,000,000 of operating income, under the orders of February 29, 1924, and June 16, 1927, the receiver expended $1,038,500 for the retirement of outstanding receiver's certificates (46a, 48a, 65a; petitioners' brief, p. 4). Since the proceeds of the certificates had been used for capital expenditures, as petitioners admit, the retirement of the certificates out of the operating earnings of the receivership constituted a diversion of the earnings to capital expenditures. We have, therefore, a situation in which more than $2,000,000 of the net earnings of the railroad in receivership have been diverted to capital expenditures. Under the authority of the above cited cases, the operating expense creditors are entitled, to this extent, to receive priority of payment over the receiver's certificates out of the corpus of the receivership estate. Since the operating claims involved in this appeal amount to only $259,477.24, it is clear that they should be paid in full before any sum is allocated to the payment of the receiver's certificates.

Petitioners argue that, regardless of strict legal principles, they are equitably entitled to be treated equally with operating expense creditors—they furnished money on credit to the receiver, the operating expense creditors furnished services and supplies on credit to the receiver. An analysis of the facts shows, however, that there is nothing to recommend this argument to the consideration of a court of equity. The claims of the respondent railroads arose in most part from freight interchange. It would seem obvious that had the receiver done what he was obligated to do and paid over to the connecting lines the funds thus coming into his hands, the appellants would have had no valid grounds for objection. It would seem equally clear that the connecting lines were not relying on the general credit of the receivership and extending credit to the receiver in this respect but that they were put by the receiver in a position in which any action on their part to enforce their rights would, if successful, have resulted in the termination of the operation of the railroad, as would any action on their part to terminate most of their other relations with the railroad which gave rise to the other portion of their claims. Moreover, any attempt by the connecting lines to change regulations and practices which governed their relation with the Pittsburg, Shawmut and Northern Railroad would have necessitated proceedings before the Interstate Commerce Commission (Act of Feb. 4, 1887, c. 104, Sec. 15, 24 Stat. 384, as amended, 49 U.S.C.A., Sec. 15) and would probably have resulted in a Commission order suspending these new regulations and practices.

As to a large portion of the operating expense claim filed by The American National Red Cross, the amount

claimed is for taxes which the receiver was obligated to pay under the terms of the leases and which constituted liens not only upon the leased property in the State of New York, but also upon the whole of the receivership property located in certain municipal subdivisions of the State of New York. In order to comply with the terms of sale it was necessary for the receivers to see that these liens were satisfied to assure that the purchaser of the receivership property secured the title he was paying for. The claim of the Red Cross to the extent that it represents payment of taxes that the receiver was obligated to pay should be given the same priority in payment that would have been given the tax claims themselves.

Petitioners, as well as other holders of certificates, are estopped because of their acquiescence and the acquiescence of their predecessors to raise any question now as to the propriety of the preferred payments to operating expense creditors. Over the long period of this receivership they knowingly stood by while the receiver paid in full his operating expenses and failed in due time, by some proper proceeding, to question the validity of his conduct. Counsel for petitioners frankly admits that there is no distinction between the operating expenses involved in this appeal and those which accrued before and after them (*ante,* pp. 4-5). This Court in *Union Trust Co. v. Illinois Midland Ry. Co.,* 117 U.S. 434, held that parties who so acquiesce and fail by proper proceeding to question the validity of an arrangement are estopped to raise any question relative to such arrangement upon proceedings for the distribution of the receivership property. In that case an arrangement was effected to establish a continuous line from Peoria, Illi-

nois, via Decatur to Terre Haute, Indiana, to be operated under a common management, and the bondholders of the Paris and Decatur Railroad and their trustee permitted the court and the receiver to go on during the entire litigation contracting debts in respect to the whole line as a unit and administering the property as one. When the estate was about to be sold and distributed these bondholders for the first time questioned the validity of the arrangement. This Court, in that connection, said (pp. 468-469):

> "Independently of this, it is entirely sufficient to rest our conclusion on the principle that nonaction on the part of the Paris and Decatur bondholders and their trustee * * * amounts to such acquiescence as should operate as an estoppel."

As a matter of fact, the operation of the railroad was, as found by the courts below, for the benefit of the certificate holders. The certificates, like the mortgage bonds, are a lien upon the properties and franchises of the railroad. The continued operation of the railroad preserved these properties as a going concern and prevented the forfeiture of the railroad's franchises and the consequent collapse of the mining enterprises; thus it preserved the security of the certificate holders and was for their benefit. By reason of the continued operations, the receivers were not forced to sacrifice the receivership properties but were able to make a judicial sale of them at a most opportune time. Courts have long recognized the equity of giving such operating expenses priority over lienholders whose security is thereby preserved. *Miltenberger v. Logansport, Crawfordsville and Southwestern Ry. Co.*, 106 U.S. 286, 310; *Union Trust Co. v. Illinois Midland Ry. Co.*, 117 U.S. 434, 456; *Gregg v. Mercantile Trust Co.*, 109 Fed. 220, 222 (C.C.A. 6,

1901), affirmed 197 U.S. 183; *Central Trust Co. v. Chicago, A. & N. Ry. Co.*, 232 Fed. 936 (N.D. Iowa, 1916).

Patently the decision of the courts below is not in conflict with the decision of this Court in *Union Trust Co. v. Illinois Midland Ry. Co.*, 117 U.S. 434, or of the the Court of Appeals for the Fifth Circuit in *First National Bank of Houston v. Ewing*, 103 Fed. 168, or of the Court of Appeals for the Eighth Circuit in *Reconstruction Finance Corp. v. Missouri-Kansas-Texas R. R. Co.*, 122 F. 2d 326, but, on the contrary, is fully in accord with those decisions.

No question of public importance or general interest is involved in this case. The case at bar only involves the private rights of 96 holders of receiver's certificates actively asserted by only 3 petitioners, holding 19.9% of the total amount of outstanding certificates, and the rights of 143 operating expense creditors.

Accordingly, the decision should not be reviewed, since there is no need to direct any modification of the order of the lower court. There is nothing in this case that justifies the granting of a writ of certiorari.

Respectfully submitted,

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